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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-376

LAKESIDE BRIDGE & STEEL CO.,

Petitioner,

v.

MOUNTAIN STATE CONSTRUCTION CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

There was no District Court opinion concerning the question of jurisdiction. The Seventh Circuit Court of Appeals' opinion is reported in 597 F.2d 596.

JURISDICTION

The jurisdictional requisites are stated in the petition.

QUESTION PRESENTED

Whether a Wisconsin Court has jurisdiction of a West Virginia defendant in a civil case solely because the Wisconsin plaintiff has elected to manufacture certain assemblies for the West Virginia defendant in the State

of Wisconsin the West Virginia defendant having no contacts with the State of Wisconsin?

STATUTORY PROVISIONS INVOLVED

The statutes involved are as set forth in the petition.

STATEMENT OF THE CASE

This is a civil action commenced in the Circuit Court, Civil Division, Milwaukee County, Wisconsin by Plaintiff, Lakeside Bridge and Steel Co., hereinafter sometimes referred to as "Lakeside" against defendant, Mountain State Construction Co., Inc., hereinafter sometimes referred to as "Mountain State". Lakeside is a Wisconsin corporation with its principal office in Milwaukee and Mountain State is a West Virginia corporation with its principal office in Charleston, West Virginia.

On July 28, 1970 Lakeside and Mountain State entered into a contract under the terms of which Lakeside was to supply to Mountain State structural assemblies for incorporation by Mountain State in the Outlet Works for the Gathright Dam and Reservoir in Virginia. Lakeside seeks to recover a balance claimed due on said contract.

Mountain State removed the case to the United States District Court for the Eastern District of Wisconsin, and filed its Motion to Dismiss for lack of personal jurisdiction or in the alternative to transfer the case to the Southern District of West Virginia or the Western District of Virginia. The Court denied the motions without opinion.

Mountain State filed its answer in which it denied that Lakeside had fulfilled its contract and counterclaimed alleging that the failure of Lakeside to fulfill

the terms of the contract had caused damage to Mountain State.

In answering Mountain State's counterclaim Lakeside denied any breach of contract and by way of affirmative defense alleged that all differences between the parties had been compromised in negotiations culminating in a written agreement of August 23, 1973 and attached a copy of the agreement to its answer.

Lakeside then filed a motion for summary judgment. That motion was heard and decided on the affidavit of Gordon C. Behnke for Lakeside, and the counter-affidavit of Dean E. Lewis, Don DeBrular, and Romie Swanson, for Mountain State. The Court denied plaintiff's motion. 400 F. Supp. 273 (E.D. Wis. 1975).

The parties went through the Court's pre-trial procedures, filed a stipulation of uncontested facts, and on March 21, 1977 appeared in Court and selected a jury for trial. On April 4, 1977 the Court released the jury because of another conflicting jury trial and declared a mistrial.

Plaintiff filed a motion requesting a conference to consider referring defendant's counterclaim to a special master. That conference was held and the Court determined that there should be an evidentiary hearing to determine the admissibility of parol evidence.

That evidentiary hearing was held on October 31, 1977.

On March 23, 1978, the Court issued its Decision and Order granting Lakeside summary judgment on its claim and dismissing Mountain State's counterclaim. 446 F. Supp. 1163 (E.D. Wis. 1978).

Mountain State appealed challenging the ruling of the District Court both on the question of the court's jurisdiction and the merits of the case. The Court of Appeals for the Seventh Circuit reached only the jurisdictional question and held that the District Court was without jurisdiction. 597 F. 2d 596 (C.C.A. 7 1979).

Mountain State's Motion to Dismiss for lack of personal jurisdiction was supported by the affidavit of Dean E. Lewis. That affidavit establishes without contradiction that Mountain State is a West Virginia corporation with its principal office in the City of Charleston, West Virginia and that it has no office, telephone or other place of business in Wisconsin; that it has at no time sent any officer, agent or employee to Wisconsin; owns no real or personal property in Wisconsin; has no bank deposits and has borrowed no money in Wisconsin; has not entered into contracts to be performed in Wisconsin; has never litigated either as a plaintiff or defendant within the State of Wisconsin and is otherwise without contact with the State of Wisconsin.

In connection with the transaction here in issue, Lakeside's agents called upon Mountain State at Mountain State's offices in West Virginia, left their proposal and solicited Mountain State's business in West Virginia. After Mountain State was awarded a contract for the construction of portions of the Gathright Dam, it prepared a purchase order which it mailed to Lakeside in Milwaukee. Lakeside made certain changes in Mountain State's purchase order and returned it to Mountain State in West Virginia where it was accepted. Mountain State had no knowledge or information as to where the components were to be manufactured and assembled

and the contract contained no requirements in that regard.

Insofar as Lakeside is concerned, the jurisdictional facts appeared in the affidavit of F. W. Hauf. That affidavit makes the following points:

1. That the materials to be supplied by Lakeside were to be supplied f.o.b. plaintiff's plant. It should be noted that the proposal of Lakeside attached to the affidavit provides that the material is to be supplied "F.O.B. Sellers Plant, Milwaukee, Wisconsin (Printed) with freight allowed to rail siding nearest project site." (Typed)

2. That in the course of dealing between the parties, Mountain State mailed correspondence and contract documents and placed telephone calls to plaintiff at its office in the City and County of Milwaukee, Wisconsin.

No where in the record is there any suggestion that Mountain State at any time had any contact with the State of Wisconsin.

It does appear in the record that Mountain State's contract was with the U. S. Army Corps of Engineers and accordingly would require a Miller Act bond to protect suppliers such as Lakeside. 40 U.S.C.A. 270a. However, actions on the bond are permitted only in the district where the improvement is located, in this instance, the Western District of Virginia. 40 U.S.C.A. 270b. We believe that this is persuasive of the fact that the parties contemplated that litigation would be in the Western District of Virginia.

ARGUMENT

1. On the Undisputed Facts of the Case There is No Basis for Jurisdiction in Wisconsin.

There is little or no disagreement as to what the facts are although there is controversy as to what legal conclusion is required by the facts.

For example, it is agreed that the contract provided that the materials to be supplied by Lakeside were to be supplied:

> "F.O.B. Seller's Plant, Milwaukee, Wisconsin (Printed) with freight allowed to rail siding nearest project site." (Typed)

Petitioner says that this provision required that the materials be shipped from Milwaukee, (p. 7 Petition) a conclusion contrary to that of the Court of Appeals. 597 F. 2d at p. 603.

We believe that the F.O.B. provision is intended to determine who has the responsibility for arranging and paying for the transportation of the materials. In view of the fact that the typed words render the printed words meaningless and without any possible application, the conclusion of Court of Appeals is clearly right.

If petitioner had elected to manufacture the parts contracted for or to have them manufactured in Virginia, no one would contend that they had to be shipped through Milwaukee in order to comply with the contract. The only importance of the place of shipment to either party is the cost and responsibility for shipment. Inasmuch as Lakeside assumed the responsibility and cost to the siding "nearest the job site", the printed words "F.O.B. Seller's Plant, Milwaukee, Wisconsin * * *" are without any force or meaning.

The original Lakeside proposal provided that Wisconsin law would govern the transaction. While respondent believes the District Court was in error in holding that the proposal was a part of the contract, even if it was there is no reason why a West Virginia or Virginia Court could not apply the Wisconsin law.

The only other contacts initiated by Mountain State and relied upon by Lakeside in support of the Wisconsin court's jurisdiction are correspondence and telephone communications between Lakeside and Mountain State, some of which were initiated by Mountain State.

Petitioner concedes that the contract did not require that the goods ordered be fabricated in Wisconsin, (p. 5 Petition), but relies upon the fact that Lakeside elected to manufacture them there in support of the jurisdiction of the Wisconsin court.

In *Hanson v. Denckla*, 357 U.S. 235 (1958), this Court said:

> "* * * The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. International Shoe Co. v. Washington 326 U.S. 310, 90 L. Ed. 95, 103, 66 S. Ct. 154, 161 A.L.R. 1057."
>
> 357 U.S. at 253.

Indeed the Court undertook to guard against just such

a situation as is here urged by Petitioner when it decided *International Shoe v. Washington*, 326 U.S. 310 (1945):

> " 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given.
>
> * * * *
>
> Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.
>
> * * * *
>
> To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.
>
> * * * *
>
> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less.
>
> * * * *
>
> Whether due process is satisfied must depend rather upon the quality and nature of the activity

> in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. *That clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.* * * * *" (Emphasis added)
>
> 326 U.S. at 317.

In this case plaintiff seeks to do that which is expressly forbidden in the *Hanson* case. Plaintiff sought out the defendant in the defendant's home jurisdiction and initiated a course of action which resulted in a contract for the purchase of materials by the defendant from the plaintiff. Insofar as the terms of the contract are concerned, plaintiff could have had the materials so ordered fabricated anywhere in the world, so long as they met the defendant's specifications. There is no indication anywhere in the record that the defendant knew or cared where the materials ordered were manufactured. The fact is that plaintiff appears to have chosen to manufacture the materials in Wisconsin, a decision by the plaintiff and an activity of the plaintiff. This "unilateral activity" of the plaintiff should not subject the defendant to the jurisdiction of courts in a distant state.

2. The Uncertainty Inherent in the Flexible Standard of International Shoe v. Washington Makes the Reconciliation of the Decided Cases Difficult But Does Not Warrant a Granting of Certiorari in the Present Case.

In *Shaffer* v. *Heitner,* 433 U.S. 186 (1977), this Court recognized that the application of the International Shoe standard to in rem cases necessarily makes the jurisdiction of the courts less certain than it would be if the Court simply held that the existence of the res within

the jurisdiction of the forum warrants the exercise of jurisdiction. 433 U.S. at 211.

Certainly, the same can be said with regard to the imposition of the International Shoe standard in cases involving in personam jurisdiction.

We think that no helpful purpose would be served by trying to analyze all of the Court of Appeals cases cited in the petition. The flexible standard applied in each of the cases render them subject to different analysis and interpretation. For example, the Court of Appeals and petitioner say that *Electro-Craft v. Maxwell Electronics Corp.*, 417 F. 2d 365 (C.C.A. 8 1969), are contrary to the holding in the instant case, (p. 8 Petition), but that action involved a Minnesota buyer in an action against a Texas seller in a Minnesota Court. The Eighth Circuit Court emphasizes this fact and suggests that a different result might be called for if the action were by a Minnesota seller. 417 F. 2d at 368.

The petitioner cites *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F. 2d 220 (C.C.A. 6, 1972), as being in conflict with the decision in this case, however, the Court of Appeals for the Seventh Circuit approved and undertook to follow the *Van Dusen* decision in *Spiegel, Inc. v. F.T.C.*, 540 F. 2d 287, 291 (C.C.A. 7, 1976). Further, in the *Van Dusen* case, it is obvious that the defendant went to the forum state to inspect the production facilities of the plaintiff and otherwise had many contacts with the forum state which are not present in the instant case.

The petitioner says that the decision in this case is in conflict with the decision of the Seventh Circuit in *O'Hare International Bank v. Hampton*, 237 F. 2d 1173 (C.C.A. 7 1971), however, that case had nothing to do

with buying or selling personal property, but rather with the proper forum to try a case involving the lease of an air-craft and the guarantors on the lease. It should be noted that Judge Pell wrote that decision as well as the decision on the instant case, and apparently does not perceive any conflict in the decisions.

The petitioner asserts that the Court of Appeals has failed to follow the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (p. 16 Petition), in holding that certain portions of the Wisconsin Long Arm Statute do not apply to the transaction here in issue. It should be noted, however, that the error, if any, has nothing to do with the outcome of the case inasmuch as the Court of Appeals found that another portion of the Wisconsin Long Arm Statute does reach the defendant if the minimum contacts required by the Fourteenth Amendment are present.

We do not believe that any one of the cases cited by the petitioner would sustain jurisdiction on the undisputed facts of this case. The respondent did absolutely nothing in the forum state. The petitioner relies upon the election of the petitioner to manufacture the articles in question in the forum state as an activity of the respondent in the forum state. Obviously, the only activity in the forum state was that generated by the petitioner's election to function in the forum state, an election in which the respondent had no part.

CONCLUSION

For these reasons, certiorari should be denied.

Respectfully submitted,

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